

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SEAN WENCLASKY,

Petitioner,

Case No. 2:15-cv-149

v.

HON. ROBERT HOLMES BELL

JEFFREY WOODS,

Respondent.

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OPINION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. On July 26, 2016, Magistrate Judge Timothy Greeley issued a Report and Recommendation (“R&R”) recommending that the petition be dismissed because it is a “mixed petition” containing both exhausted and unexhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982). Petitioner did not file an objection to the R&R. This matter is before the Court on Respondent’s motion to dismiss Petitioner’s application for failure to exhaust all claims (ECF No. 8) and the R&R (ECF No. 10).

Petitioner raises two claims in his § 2254 petition. First, he claims that he is entitled to re-sentencing due to scoring based upon inaccurate information, and that defense counsel was ineffective for failing to challenge the scoring. Second, he claims that he was overcharged due to his psychiatric history, was not permitted to allocute, was not competent to stand trial, and was erroneously scored as a habitual offender. He also asserts that the

sentencing court was biased against him. (ECF No. 1; PageID.6-7) Petitioner has not fully exhausted his second claim. The Court could have granted Respondent's motion to dismiss when it was filed on April 28, 2016. But by the time that the R&R was filed on July 26, 2016, Petitioner had less than sixty days remaining in the limitations period to exhaust this claim in state court. Because of this, the Court will not dismiss the action at this time.

Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to "fairly present" federal claims so that state courts have a "fair opportunity" to apply controlling legal principles to the facts bearing upon a petitioner's constitutional claim. *See O'Sullivan*, 526 U.S. at 842; *Picard v. Connor*, 404 U.S. 270, 275-77 (1971), *cited in Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *Anderson v. Harless*, 459 U.S. 4, 6 (1982). To fulfill the exhaustion requirement, a petitioner must have fairly presented his federal claims to all levels of the state appellate system, including the state's highest court. *Duncan*, 513 U.S. at 365-66; *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

Petitioner bears the burden of showing exhaustion. *See Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Petitioner asserts that he added the second issue as a new issue in his application for leave to appeal in the Michigan Supreme Court. (ECF No. 1; PageID.7-8.)

Based on Petitioner's application to the Michigan Supreme Court, it appears that he did not raise this issue. (ECF No. 9-9, PageID.126.) Even if he did, Petitioner did not raise it with the Michigan Court of Appeals. (ECF No. 9-8, PageID.90-95.) Therefore, the issue is not fully exhausted.

Because Petitioner has one claim that is exhausted and one claim that is not, his petition is "mixed." Under *Rose v. Lundy*, 455 U.S. 509, 522 (1982), district courts are directed to dismiss mixed petitions without prejudice in order to allow petitioners to return to state court to exhaust remedies. However, since the habeas statute was amended to impose a one-year statute of limitations on habeas claims, *see* 28 U.S.C. § 2244(d)(1), dismissal without prejudice often effectively precludes future federal habeas review. This is particularly true after the Supreme Court ruled in *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001), that the limitations period is not tolled during the pendency of a federal habeas petition.

As a result, the Sixth Circuit adopted a stay-and-abeyance procedure for mixed petitions. *See Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002). In *Palmer*, the Sixth Circuit held that when the dismissal of a mixed petition could jeopardize the timeliness of a subsequent petition, the district court should dismiss only the unexhausted claims and stay further proceedings on the remaining portion until the petitioner has exhausted his claims in the state court. *Id.*; *see also Griffin v. Rogers*, 308 F.3d 647, 652 n.1 (6th Cir. 2002).

Petitioner's application is subject to the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1)(A), the one-year limitation period runs from "the

date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” Petitioner appealed his conviction to the Michigan Court of Appeals and the Michigan Supreme Court. The Michigan Supreme Court denied his application on May 28, 2015. Petitioner did not petition for certiorari to the United States Supreme Court, though the ninety-day period in which he could have sought review in the United States Supreme Court is counted under § 2244(d)(1)(A). *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on August 26, 2015. Accordingly, Petitioner had one year, until August 26, 2016, in which to file a fully-exhausted habeas petition.

The *Palmer* Court has indicated that thirty days is a reasonable amount of time for a petitioner to file a motion for post-conviction relief in state court, and another thirty days is a reasonable amount of time for a petitioner to return to federal court after he has exhausted his state-court remedies. *Palmer*, 276 F.3d at 721. *See also Griffin*, 308 F.3d at 653 (holding that sixty days amounts to mandatory period of equitable tolling under *Palmer*).¹

In this case, the Magistrate Judge filed the R&R on July 26, 2016, which left Petitioner with less than sixty days remaining before the statute of limitations expired. Petitioner did not have the necessary thirty days to file a motion for post-conviction relief or the additional thirty days to return to this Court before the statute of limitations expired. As a result, if the Court dismissed the petition without prejudice for failure to exhaust, the

¹The running of the statute of limitations is tolled while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

dismissal could jeopardize the timeliness of any subsequent petition. *Palmer*, 276 F.3d at 781.

The Supreme Court has held, however, that the type of stay-and-abeyance procedure set forth in *Palmer* should be available only in limited circumstances because over-expansive use of the procedure would thwart the AEDPA's goals of achieving finality and encouraging petitioners to first exhaust all of their claims in the state courts. See *Rhines v. Weber*, 544 U.S. 269, 277 (2005). In its discretion, a district court contemplating stay and abeyance should stay the mixed petition pending prompt exhaustion of state remedies if there is "good cause" for the petitioner's failure to exhaust, if the petitioner's unexhausted claims are not "plainly meritless" and if there is no indication that the petitioner engaged in "intentionally dilatory litigation tactics." *Id.* at 278. Moreover, under *Rhines*, if the district court determines that a stay is inappropriate, it must allow the petitioner the opportunity to delete the unexhausted claims from his petition, especially in circumstances in which dismissal of the entire petition without prejudice would "unreasonably impair the petitioner's right to obtain federal relief." *Id.*

Consequently, if Petitioner wishes to pursue his unexhausted claim in the state courts, he must show cause within 28 days why he is entitled to a stay of these proceedings. Specifically, Petitioner must show: (1) good cause for his failure to exhaust before filing his habeas petition; (2) that his unexhausted claims are not plainly meritless; and (3) that he has not engaged in intentionally dilatory litigation tactics. See *Rhines*, 544 U.S. at 277-78. If

Petitioner fails to meet the *Rhines* requirements for a stay or fails to timely comply with the Court's order, the Court will review only his exhausted claim.

An order consistent with this opinion will be entered.

Date: October 14, 2016

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE